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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. RICHARD YRIGOYEN, Defendant and Appellant.	G054371 (Super. Ct. No. 15NF2463) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Kendall Dawson Wasley, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Randall D. Einhorn and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Richard Yrigoyen of two counts of lewd act on a child. (Pen. Code, § 288, subd. (a).) His conviction on count 1 was based on a touching that occurred inside a Walmart store. The information alleged the other count occurred between July 1, 2013 and September 3, 2015. Defendant contends the trial court prejudicially erred in admitting the testimony of two coworkers who heard him make lewd comments about his girlfriend's daughter, the victim. His second claim involves the superior court's review of the school records of the victim. The court reviewed the subpoenaed records in camera and found nothing discoverable in the records. Defendant asks that we independently review the records to determine whether information therein should have been disclosed to him. We find the trial court did not err in admitting the complained of evidence and the records did not contain any discoverable information.

FACTS

Background

A.S. is the mother of M.S. M.S. was 10 years old in September 2015. A.S. and her daughter lived with defendant and his brother E.S. in a two bedroom apartment in Anaheim at the time. Defendant and E.S. slept in one bedroom, A.S. and M.S. slept in the other. A.S. and defendant were dating. She met defendant when she moved into a house in which he and others were living in July 2013.

A.S. would leave M.S. alone with defendant on occasion. She also permitted him to take M.S. places without her being present. Prior to the charged incident, M.S. complained to her mother at least three times about defendant touching her "butt." The first time, they were still living in the house and A.S. confronted defendant about touching M.S. Defendant said it was an accident. The next time A.S. she spoke to him about touching M.S., they were living in the apartment in Anaheim. He said he had, but they were just playing around, it was nothing, and A.S. was taking it too seriously.

M.S. complained to her mother that defendant kept touching her bottom and she told him to stop it. Defendant told A.S. she was making too much of it. She told him M.S. feels uncomfortable and does not like it. She asked him to stop. When A.S. left the room, he did it again and A.S. yelled at him to keep his hands off of her. Defendant told A.S. people would not believe her because he has no record. In addition, he said no one would believe a child over him. A.S. said she did not call the police because she did not think it was serious and she did not believe the police would believe her.

Shortly before September 1, 2015, M.S. told her mother defendant grabbed her between her legs while they were in the pool at the apartment. A.S. admitted she never observed defendant acting inappropriately with M.S, but after M.S. complained about being grabbed in the pool, A.S. called the police.

The Walmart Incident

On September 1, 2015, A.S. got into a verbal altercation with E.S. and M.S. She yelled at both of them. When defendant came home, he took E.S. and M.S. to the store where they were to pick up items for a barbeque. M.S. had some money with her to buy a toy.

Later that day, Jose Barajas was working at in the toy department at a Walmart in Buena Park, when he noticed an older adult male,[1] later identified as defendant, "suspiciously close" to a young girl, later identified as M.S. Barajas said defendant's hand was on M.S.'s "butt." When Barajas first saw them, defendant had his hand on her back and was moving it down as he started looking around. When his had reached M.S.'s "behind," defendant saw Barajas. Defendant then attempted "to play cool as [if] nothing happened."

[1] Defendant was 51 years old.

Barajas went into the next isle in an effort to eavesdrop on the conversation between defendant and M.S. After listening to their conversation, Barajas called security to keep an eye on defendant and M.S. Brandon Blackley, a loss prevention associate at Walmart, watched one of the store's surveillance cameras located in the toy department and saw defendant and M.S. laughing about something. Defendant looked up to see if there were any cameras and started rubbing the girl's behind. Blackley said defendant rubbed M.S.'s "behind numerous times." Blackley made a copy of the video and gave it to the Buena Park Police Department. The Walmart video was played for the jury.

Defendant's Statements to Law Enforcement

Officer Christos Charalambous responded to the Walmart and spoke with defendant in front of the store. He asked defendant the nature of his relationship with the M.S. Defendant said she is his girlfriend's daughter. Defendant denied touching M.S.'s "butt." He spoke of caressing her back and said his hand may have accidentally bumped into her butt when she was moving around. The officer asked defendant if he caressed M.S.'s butt and defendant said he did not.

Later that day, Charalambous questioned defendant again, this time in the jail. The recording of the interrogation was played for the jury. The officer told defendant he watched the video from the store. When asked if he had rubbed M.S. "in the buttocks area," defendant said he "may have," but it was out of affection and not perversion. Defendant denied being aroused by touching her. The officer told defendant he saw the girl hit him a number of times with a bag to get him to stop, to no avail. Defendant said she was being playful and he thought nothing of it.

Defendant asked to see the video. He said it was "[p]robably not" a good idea to rub her buttocks as he did, and he understood why Walmart employees became involved. He admitted his actions were not appropriate. He also admitted he touched M.S.'s buttocks and she hit him and told him to stop. Defendant said what he did was not sexually arousing and was more out of "parental affection."

A week after the Walmart incident, Detective Todd Franssen interviewed defendant in a conference room at his place of work. A recording of the interrogation was played for the jury. Defendant said his arrest was "a big misunderstanding." He said that on the day of the Walmart incident he arrived at home and found out A.S. had fought with M.S. and E.S. He took M.S. and E.S. to Walmart to separate them from A.S. M.S. had $20, so they went to the toy section. Defendant said he was in a hurry to get home to barbeque, so he was trying to hurry M.S. along because she "takes forever" in the toy department. Because she was taking so long, he gave her a pat "on the butt" to hurry up. He said his parents would "slap [him] on the butt" when he took too much time. Defendant felt his conduct was innocent.

Franssen told defendant his conduct with M.S. was recorded by cameras in Walmart and there is a discrepancy between the video and his description of the incident. He showed defendant some still photographs taken from the video. Defendant said he was comforting M.S. who was upset because of the fight she had with her mother. Franssen then showed defendant the video. At one point the camera zoomed in and showed defendant's hand on M.S.'s behind. Another time the video showed defendant's hand on the side of her ribs. Defendant admitted it looked like a rub, not a pat, and M.S. swatted at him twice. At one point, defendant said he was "patting off her shorts" because she appeared to have dirt or smudge on them.

After watching a portion of the video, Franssen asked defendant if it changed whether he patted M.S. or rubbed her. Defendant said "maybe it was inappropriate," but he was comforting her. Defendant added, "That doesn't look good" and he "may have been a little out of bounds there." He denied any sexual drive due to his diabetes.

At one point, the video shows defendant walking and Franssen noted defendant's hands were not visible. Defendant said he kept his hands in front of his pelvic area. At that point, Franssen rewound the tape and stopped it when the video

showed defendant's right hand at his crotch. He asked defendant what it showed him doing. Defendant said he "had to go to the bathroom bad," and he was pressing on his bladder. He denied having had an erection and adjusting himself. He said it was difficult for him to achieve an erection due to his diabetes. Notwithstanding defendant's statement about the need to urinate, he did not go to the store's restroom and did not urinate until approximately an hour and 40 minutes later, after he was arrested.

Defendant admitted in was inappropriate for him to rub a 10 year old's butt, although he admitted he did it two or three times on the video. When he was told the video showed him with his hand between the cheeks of M.S.'s buttocks, defendant agreed that was wrong, but claimed his hand was on her cheek, not between them, and again denied having an erection.

M.S.'s Testimony

M.S. said she met defendant when she and her mother moved into a house with defendant and a number of other people. Later, she and her mother moved into an apartment with defendant and E.S. M.S. said defendant touched her where she did not want to be touched. She said he touched her in the front area a couple of times and the back area. She had no other name for the "front area," but said she calls the back area "the butt" or "the bottom." Once while they were living in the house, defendant touched her back area in the hallway and called her "apple bottoms." More than once, defendant told M.S. that if she told on him, he would deny it.

The first time defendant touched her in the front area, she was with him in a car. He touched her over her clothes. He said nothing to her. The first time defendant touched M.S.'s back area was in his bedroom when they were all living in a house. She said he had his hand on her back area for about five seconds, during which time she told him to stop, but he did not. The last time was in Walmart. He touched her back area more than once inside Walmart. When he did, M.S. twice hit his hand with the bag she

was carrying and twice told him to stop. While they were in Walmart, defendant asked M.S. if he could have her when she turns 18 years old.

Social Services Interviews

Adriana Ball, a social worker, interviewed M.S. a week after the Walmart incident. The video of the interview was played for the jury. M.S. told Ball about defendant touching her in the Walmart. She denied defendant molesting her on any other occasions.

M.S. was subsequently interviewed by a second social worker. This time she described defendant touching her inappropriately on a number of occasions and said the last time was at Walmart. She said he once squeezed her "bottom," skin-to-skin, in the hallway of the house they used to live in. He did that right after offering her $100. M.S. said she told her mother about it immediately after it happened. M.S. told the social worker defendant once told her he wanted to "fuck" her when she turns 18 years old.

The Defense Case

Christine Lino played in a band with defendant for four or five years, but had not seen him for about three years prior to trial. They usually rehearsed every Friday. They did not socialize with each other outside the band.

Because the rehearsals were after school, Lino took her youngest son and her daughter to the reheasals. A second son went along sometimes as well, because he liked to play drums. Lino said her children and defendant got along "fine" and that he was "real good" with her children. She has never known defendant to lie about anything. She did say she has seen defendant joke around and that sometimes he is "a little immature." When she heard defendant was charged with committing lewd acts on a child, she did not believe it because it is out of character for defendant.

Manuel Barquera has known defendant's family since 1974. Barquera took a parental roll with defendant "once in a while" and they took welding classes together. He said defendant is an honest person. Defendant made sure none of his brothers "got

out of line." Barquera was at the apartment one time with defendant in the pool while defendant babysat M.S. He saw nothing inappropriate between defendant and M.S.

Barquera stated defendant is mature and does not joke around much. When he heard of defendant's arrest he thought the police had the wrong guy; that defendant was not that kind of person. When shown the video of the Walmart incident, Barquera said it appeared defendant "got a little too carried away."

Defendant's older brother D.S. played in the band with defendant and Lino. He said defendant is honest, if immature. David did "not see" defendant interact with M.S. It would be out of character for defendant to have lewdly touched a child.

Junko Taminaga, a senior social worker, interviewed M.S. on September 1, 2015, about being touched while in the Walmart store. M.S. told Taminaga that was the first time defendant touched her buttocks.

Taminaga also spoke with A.S. A.S. said she had no concerns about defendant's interactions with M.S. prior to that day.

Robert Tapia has known defendant since the early to mid-1990's and spend "quite a lot" of time with him. He too, played in the band with defendant. Tapia said defendant can be "a little annoying sometimes," and talks a lot, but he is very honest and reliable. When Tapia heard of the charges, he "was in disbelief." He has never seen defendant interact inappropriately with children.

Additional facts are set forth below where relevant.

DISCUSSION

1. *Admissibility of Defendant's Statements to Coworkers*

Defendant moved to exclude the testimony of two of his coworkers about statements he made concerning M.S. He argued the evidence was not relevant, any relevancy was substantially outweighed by its prejudicial effect (see Evid. Code, § 352), and the evidence is improper character evidence. On appeal, he contends the trial court prejudicially erred in admitting their testimony.

We review the court's decision admitting evidence of other crimes for an abuse of discretion. (*People v. Catlin* (2001) 26 Cal.4th 81, 122.) "'As a general matter, a trial court is vested with broad discretion in ruling on the admissibility of evidence. The court's ruling will be upset only if there is a clear showing of an abuse of discretion, i.e., that the court exceeded the bounds of reason.' [Citation.]" (*People v. Dean* (2009) 174 Cal.App.4th 186, 193.) The same rule applies when an appellate court reviews a trial court's decision under Evidence Code section 352. (*People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

We begin with the primary rule of evidence: Only relevant evidence is admissible. (Evid. Code, § 350.) "'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) As a general rule, "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Evid. Code, § 1101, subd. (a).) This provision does not, however, prohibit "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

Although defendant initially denied touching M.S.'s buttocks, he subsequently admitted he rubbed M.S.'s buttocks in Walmart, said it was "[p]robably not" a good idea to rub her buttocks as he did, and his touching "may have been a little out of bounds." That being said, he maintained he had no sexual intent in rubbing her

buttocks. According to defendant, any touching had its basis in affection, not perversion. At various times, he said he was being playful and thought nothing of it, acted out of "parental affection," and he only gave her a pat "on her butt" to get her to hurry up.

Penal Code section 288, subdivision (a) makes it a felony for one to "willfully and lewdly commit[] any lewd or lascivious act, . . . upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child." To establish a violation of this section beyond a reasonable doubt, the prosecutor was required to prove defendant intended to gratify the sexual desires of M.S. or himself. (*People v. Martinez* (1995) 11 Cal.4th 434, 452.) Thus, evidence tending to show defendant had a sexual intent was relevant. (See Evid. Code, § 1101, subd. (b) [past act admissible to prove intent].)

Israel Garcia was a coworker of defendant's. They worked in different departments and only had contact when defendant was sent to work in the department where Garcia worked, or at break time. In 2015, while working together, Garcia heard defendant make a comment about his girlfriend's daughter without naming the daughter. Defendant said that when his girlfriend's daughter eats french fries, it looked like she is sucking on a penis. After hearing the comment, Garcia walked away.

Bryan Black also worked with defendant. Black worked in the same department as Garcia. Black once heard defendant say he liked the way his girlfriend's daughter ate french fries. Defendant also said he told her that she better like having sex and be good at it because that is the way to keep a man; and that that is what all men want. Black stated defendant's statement about the girl eating french fries was said in a "suggestive manner" and defendant sounded serious. Black reported defendant's comments to his (Black's) lead man.

These statements were relevant to prove an essential element of the charged offenses—defendant's intent. Defendant made the statement Garcia heard within months

of the Walmart incident. The statements demonstrated defendant had a sexual interest in M.S. If an individual with a sexual interest in a child touches the child's buttocks in an objectively inappropriate manner—a fact defendant appears to have admitted—a jury could rationally conclude the touching was with the intent of gratifying his expressed sexual interest in the child.

This does not end our inquiry. Evidence otherwise admissible may become inadmissible if it would be overly prejudicial to the defendant. "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) For evidence to be inadmissible under Evidence Code section 352, the probative value of the evidence must be "*substantially* outweighed by its prejudicial effect." (*People v. Tran* (2011) 51 Cal.4th 1040, 1047.)

Defendant's statements indicating a sexual interest in 10-year-old M.S. was highly probative of his intent and undermined his stated innocent intent. The statements referred to defendant's interest, not in young girls in general, but in M.S. in particular. "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial." The "prejudice" referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues.'" (*People v. Karis* (1988) 46 Cal.3d 612, 638.) It cannot be said defendant's statements overheard by Garcia and Black had "very little effect" on the *issue* of defendant's intent when he caressed or otherwise repeatedly touched M.S.'s buttocks. Consequently, we find defendant was not

prejudiced by admission into evidence of his statements and the trial court did not err in admitting the evidence.

2. *Subpoenaed School Records*

Defendant issued a subpoena duces tecum for M.S.'s school records. Those records were received by the superior court on June 10, 2016. On September 1, the defense requested the trial court release the records to it. Judge Kimberly Menninger read and considered defense counsel's sealed declaration in support of releasing the records. The court found good cause to review the records in camera, concluded the responding documents did not provide any information responsive to the subpoena duces tecum, and ordered the in camera proceedings sealed.

Defendant asks this court to review the records to determine whether they contain information that should have been revealed to him. The Attorney General does not object to his request.

"'An accused is entitled to any "'pretrial knowledge of any unprivileged evidence, or information that might lead to the discovery of evidence, if it appears reasonable that such knowledge will assist him in preparing his defense. . . .' [Citation.]" [Citations.]' [Citation.] Documents and records in the possession of nonparty witnesses and government agencies other than agents or employees of the prosecutor are obtainable by subpoena duces tecum. [Citation.] A criminal defendant has a right to discovery by a subpoena duces tecum of third party records on a showing of good cause—that is, specific facts justifying discovery." (*People v. Superior Court* (*Barrett*) (2000) 80 Cal.App.4th 1305, 1318.) Education Code section 49076 authorizes access to a student's school records pursuant to a judicial order. Of course, a subpoena duces tecum pursuant to Penal Code section 1326 is a ministerial act and does not constitute legal process until such time as the court determines the party who subpoenaed the records is entitled to them. (*People v. Blair* (1979) 25 Cal.3d 640, 651.) We review a trial court's discovery ruling for an abuse of discretion. (*Hill v. Superior Court* (1974) 10 Cal.3d 812, 816.)

We have reviewed defendant's subpoena duces tecum, including the sealed declaration in support thereof, as well as the records submitted to the court in response to the subpoena. We conclude the trial court did not abuse its discretion in finding no discoverable information in the subpoenaed records.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

O'LEARY, P. J.

GOETHALS, J.